United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1205

To be argued by
BARRY J. TELLER

In The

United States Court of Appeals

For The Second Circuit

THE UNITED STATES OF AMERICA,

Appellee

-against-

MAURICE BROWN,

Defendant-Appellant.

On Appeal from a Judgment of Conviction of the United States District Court for the Southern District of New York

BRIEF FOR DEFENDANT-APPELLANT

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APPELLANT'S BRIEF

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction entered the 24th day of February, 1976, in the United States District Court for the Southern District of New York, sentencing appellant to a term of five years imprisonment, on his conviction by a jury on two counts of an indictment charging him with nine counts of violation of 18 U.S.C.A. 2314 and 2, by allegedly causing "to be transported in interstate commerce from New York, New York to Denver, Colorado, falsely made, forged and altered and counterfeited securities, to wit, the American Express Money Orders described... knowing the same to have been falsely made, forged, altered and counterfeited", on various dates set forth in each count, between August 12, 1973 and September 6, 1973. Counts seven and nine were

withdrawn by the Government, at the commencement of trial. The jury found appellant guilty on counts one and two. However, the jury could not reach a verdict on the balance of five counts.

STATEMENT OF FACTS

The indictment charges appellant with nine counts of illegal interstate transportation of nine American Express Money Orders, in violation of 18 U.S.C.A. 2314 and 2, commited on various days in the months of August and September of 1973. At the outset of trial, the Assistant United States Attorney withdrew the seventh and ninth counts, which the Court dismissed. (P. 8*)

In his opening statement to the jury, the Assistant United States Attorney made his offer to prove that American Express Company mailed forty money orders to Wonder Food Store in the Bronx, that the store was burglarized, that the forty money orders were stolen that seven are the subject of seven counts of the indictment and that they were forged and transported in interstate commerce. (P. 9). He further offered to prove that two were cashed by Tennyson Hall, who gave the money to appellant, two by Ruby Burns, who also gave the money to appellant, and the last three by appellant himself, two against his checking account and the third at the racetrack. (P. 10).

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* Page numbers preceded by the letter "P" refer to trial record.

John H. Oliver, the first Government witness, testified that he is employed by American Express Company in Denver, Colorado. (P. 14). He is the fraud supervisor for the company (P. 15).

He explained that to be validated, the amount of each money order must be imprinted with a machine supplied by American Express Company to various authorized agents, for sale to the public. (P. 15-6).

He testified that forty money orders had to be resupplied to Wonder Food Store, in two books. No trust receipt had been received for the original money orders supplied. (P. 19-23).

The money orderes paid in the case at bar cleared through the First National Bank in Denver. (P. 29)

Over objection, the witness testified that money orders are generally used to pay "various bills", usually in a low faced amount, that it is unusual for money orders to be made out to individuals and that the ones that are the subject of the indictment are unusual because made out in even dollar amounts (P. 30-32).

On cross-examination, the witness testified that he does not have personal knowledge of the matters concerning which he testified and that, perhaps, a million money orders a year are made out in the fashion that he described as unusual. (P. 33-35).

Louis Venturini, the former owner of Wonder Food Store, Phillip Avenue, Bronx, was the second Government witness. (P. 36). He testified that he had been an American Express Company agent, selling money orders by validating them through the machine they supplied. (P. 36-7). In July of 1973, he found that the store had been broken into. The American Express Company machine had been taken. (P. 37-8). He denied selling the money orders that are the subject of the indictment that range from $90 to $180 face value, since those he sold were for small amounts, usually under fifty dollars (P. 43).

The third Government witness was Tennyson L. Hall. He had prior convictions for aiding and abetting in the distribution of drugs, criminal possession of dangerous weapons and possession of stolen property. (P. 44). He no longer uses drugs. (P. 45).

He testified that he met appellant at the racetrack. Appellant asked him to cash a money order that he had secured in payment of a loan (P. 46). Two such transactions took place in the summer of 1973. The witness deposited the money order in his accounts in the Manufacturer's Trust Company - one located on Hillside Avenue, Queens County, and the other on 50th Street in Manhattan. (P. 47). The witness testified that he gave the money to appellant. (P. 48). At the time he deposited the second check, his account did not have sufficient funds to draw upon and so, he paid him a few days later. (P.49-50)

Both checks, introduced into evidence as Exhibits 4 and 5 were signed by appellant. (P. 51-2).

When first interviewed, the witness did not tell the Federal Bureau of Investigation agents that appellant had given him the checks. (P. 53).

Ruby Burns, the girlfriend of Hall, cashed another money order for appellant. (P. 55). Hall and appellant accompanied Miss Burns to her bank. (P. 56) When she came out, she gave the money to appellant. (P. 57).

Counsel for appellant made an objection to the venue of this action, in respect to all money orders that were cashed in Queens County. The United States Attorney argued that irrespective of the place where they were cashed, all of them cleared through Manhattan, on their way to Denver. (P. 59).

On a second occasion, appellant and Tennyson Hall went to the home of Ruby Burns and drove her to her bank. (P. 63). She went in to cash another money order. When she came out, she gave the proceeds to appellant. (P. 63-4).

Tennyson Hall testified that in the summer of 1974, he met appellant at the race track. This was after being interviewed by the Federal Bureau of Investigation. He told appellant that the money orders were bad and the agents had been in touch with him. Appellant answered, "that is your problem." (P. 65-6).

On cross-examination, Hall testified that Agent Quinn had told him he could be prosecuted for the transaction. (P. 69-70)

Ruby Burns was the fourth witness for the Government. (P. 78). She testified that in 1972, she began going out with Tennyson Hall. (P. 80). They ended their relationship in 1973. However, before that took place, Hall had introduced her to appellant. (P. 81). She went with Hall and appellant to a bank to cash a money order. She returned and said that she did not withdraw the proceeds, but would wait for the item to clear. (P. 82-3). Subsequently, she returned to the bank - the Central Queens Savings Bank - and withdrew the proceeds. (P. 84). She does not remember who told her to return to the bank to get the money. (P. 86). The money orders were made out to Cecilia Torres and Juan Torres, Exhibits 3 and 6. (P. 88-9). These were the signatures on them when she received them. (P. 90-1). The amount was for $140. (P. 92).

On cross-examination she testified that she is 21 years of age, and was aware of Hall's criminal record when she was going with him. (P. 98).

The fifth Government witness was F.B.I. Special Agent Joseph Goodwin Monroe. (P. 106). March 6, 1974, he went to 230 First Street, to check whether Juan Torres resided there (P. 107-9). The result was negative. Andy Furman resides there. (P. 109).

On cross-examination, he conceded that he made his investigation eight months after the crime occurred. (P. 111-2)

George Kiriakos was the fifth Government witness.

(P. 112). He testified that he is employed by Manufacturer's Trust Company, in charge of the check processing adjustment department. (P. 113). The money order depicted as Exhibit 4 was deposited in the midtown Manhattan branch and the one depicted as Exhibit 5 was deposited in Queens and forwarded to the Manhattan office for clearing. (P. 114-5). Both were then forwarded to Denver. (P. 117).

Daniel Weiss, the sixth Government witness, testified that he is a security officer for the Marine Midland Bank. He is an investigator and examines checks and money orders. (P. 118).

He identified an American Express Company money order and testified that the stamp reflects that the check had been forwarded to Denver. (P. 119). The stamp had been placed on it at the 140 Broadway branch. (P. 120).

On cross-examination, he conceded that the checks concerning which he testified had not been cashed in Manhattan. (P. 121).

Norman Surber, employed as a Mutual Clerk by the New York State Racing Association, at Aqueduct, was the seventh Government witness. He testified that he sent appellant to the check casher, Charles Kenny, to cash a money order. (P. 123-4).

Charles Walter Kenny, also employed by the New York State Racing Association, the eighth Government witness, testified that he knows Norman Suber and identified an

American Express money order that he cashed at Aqueduct. (P. 126).

On cross-examination, the witness testified that he has only a hazy recollection of the incident and cannot identify who cashed the item. (P. 126).

John J. Vehey, the Ninth Government witness, testified that he heads the check processing department of Morgan Guarantee Trust Company. He identified Exhibit 1 as an American Express Company money order. (P. 131). He testified that it passed through the Morgan Guarantee Trust Company (P. 131). It was deposited by the New York State Racing Association. (P. 132). It was stamped at the Manhattan Branch (P. 133) and then forwarded to Denver (P. 134).

The tenth witness for the Government was Thomas McGlynn, employed by the National Bank of North America. (P. 141). He identified Exhibit 2 as an American Express Company money order for ninety dollars payable to appellant, that was cashed at branch 106, 216-02 Merrick Boulevard, Springfield Gardens, Queens. It was forwarded to the proof department at 396 Park Avenue South, in Manhattan. (P. 141-2) Then, it was forwarded to Denver. He also identified a similar American Express Company money order for $180., payable to appellant. (P. 143). They were cashed through appellant's special checking account. (P. 144-5).

The eleventh Government witness was Federal Bureau of Investigation Special Agent Thomas Quinn. He went to the home of appellant on October 3, 1974. (P. 148-9).

At this junction of the proceedings, the Court ordered a "Miranda" hearing to be conducted outside the presence of the jury. (P. 149). The witness testified he went upstairs with other agents and met appellant in his bedroom. He advised appellant that he had a warrant for his arrest and advised him of his rights. (P. 152-3). He further advised him that he was under arrest for interstate transportation of stolen property. (P. 154). He testified that he read him his Constitutional rights, but has no independent recollection of the content. The United States Attorney showed him a form. (P. 155).

The witness testified that appellant admitted to him that he understood his rights. However, no interrogation took place at this time. Instead, they went to the Federal Bureau of Investigation office in Manhattan. There, the witness handed appellant a card to read containing his rights and directed him to read part aloud and part to himself. (P. 158). The witness testified that appellant said he understood his rights, but refused to sign the form. According to the witness, he said he would not answer all questions, but he would answer the questions he thought that should be answered. (P. 159).

On cross-examination, Special Agent Quinn testified that the witness asked to make a telephone call and was interviewed after he made it. He does not know who he called. (P. 163-4).

The Court made findings that appellant had been properly warned of his rights and so, his statement would be properly admitted into evidence. (P. 167).

The jury was recalled and the trial resumed with the testimony of Special Agent Quinn. He repeated his testimony, this time for the jury, that he went to appellant's house and advised a woman who identified herself as appellant's wife, that he had a warrant for his arrest. (P. 168). He went upstairs, placed appellant under arrest and advised him of his rights. (P. 169). Appellant said that he understood his rights and was then taken by Quinn and other agents to the Manhattan office. (P. 171). There, appellant declined to sign a waiver. (P. 172). Quinn identified Exhibits 1-A through 7-A as photocopies of American Express Company money orders. (P. 173). Quinn showed the photocopies of Exhibits 1-A, 2-A and 7-A to appellant, each of which were made payable to his order and bore his endorsement. Appellant acknowledged the signatures to be his. (P. 174-5). He said he probably had deposited them in his account, but could not recall where he got them. (P. 175-6). Exhibits 4-A and 5-A are payable to the order of Tennyson Hall. Appellant told Quinn that he never saw them before and that he never gave anyone money orders to cash them for him. (P. 175-6).

Appellant's objection was overruled to the testimony of Quinn that appellant voluntarily spoke in the court lobby

to Quinn after arraignment (P. 178-9). Appellant asked Quinn if he would have been arrested, had he told where he had gotten the money orders. (P. 179-180). Quinn answered that if he wished to make a statement, appellant should do it in a proper manner. (P. 180).

Quinn testified that from the street directory of Boston, it appeared that the street address of the alleged sender of Exhibits 4-A and 5-A is nonexistent. (P. 181-2). The address of the alleged sender of Exhibit 1-A, Helen Cooper, is a synagogue at 536 West 148th Street. (P. 182-3). The alleged sender of Exhibit 2-A, Carol Lynn, 145 West 135th Street, New York, could not be found. (P. 184).

On cross-examination, the defense caused to have admitted into evidence a log of the interview by Special Agent, which does not reflect any statement made by appellant. (P. 188). The Court then instructed the jury that it is the judge's function to determine the voluntariness of the statement, but the jury's to pass on its credibility. (P. 192).

On redirect examination, introduced into evidence was Exhibit 22, Agent Quinn's notation of the contents of appellant's statement. (P. 192-3). It dovetailed with his oral testimony. (P. 194-6).

Appellant objected to an offer of proof by the Government of similar acts committed by appellant. (P. 198-9). Exhibit 8, an American Express Company money order, not

charged in the indictment, contains appellant's fingerprint. It came from the batch of forty stolen money orders. Appellant's objection was overruled. Appellant then stipulated that the fingerprint was his (P. 200).

The twelfth Government witness was Federal Bureau of Investigation Special Agent Susan Monserrate. (P. 202). She had participated in the arrest of appellant. (P. 203). She was with Quinn when appellant had approached him in the courthouse lobby and asked him whether he would have arrested him, had appellant told him where he had obtained the money orders. (P. 204-5).

The thirteenth Government witness was Delma R. Winkelvoss, a fingerprint expert with the Federal Bureau of Investigation. (P. 207). Exhibit 8 contains the names Charles Roond and Helen Roond. (P. 208-9). It also contains appellant's fingerprints. (P. 209).

The fourteenth and final Government witness was Arthur B. Fleming, a supervisor of Ideal Toy Company, 184-10 Jamaica, who served eleven years in prison for robbery. (p. 214). He testified that since leaving prison he committed forgery. He is not being paid to testify at this trial, but was paid two hundred dollars in the past by law enforcement officers (P. 215).

He testified that he knows appellant, having met him at the racetrack in 1970 or 1971. Appellant told him he would show him how to make money if he ever comes in contact with checks and bank books. (P. 216-7).

The witness called appellant and showed him a personal check from a friend of his father's. (P. 217). Appellant copied the account number, the bank name and the signature. He took one of the cancelled checks from the witness. (P. 218) Appellant assured Fleming that his father would not loose money. (P. 219). Objection to this testimony was again overruled, the Court ruling that the evidence was admissible on the issues of knowledge and intent. (P. 219-220). Appellant told the witness he will make the check payable to the witness' father and that the witness should cash it. (P. 220) The witness went to the bank, cashed it and split the proceeds with him. (P. 221). The Court instructed the jury that the evidence cannot be used to reflect appellant's propensity to commit the crime charged. (P. 222)

The witness testified that they did other check forgeries in 1971 and 1972. (P. 226). The witness was arrested for passing bad checks and was fined. He then cooperated with the police (P. 227-8).

In 1972, the witness wore a tape recorder for the Queens police, to record his talks with appellant to find out the bank they were going to.

The Government rested with the testimony of Fleming. Appellant's motion to dismiss for failure to make out a prima facie case was denied, as was his motion to dismiss all of the counts, with the exception of Count Four, for improper

venue, since all of the checks were cashed in Queens, with the exception of the one that Tennyson Hall cashed in Manhattan. Therefore, he argued with the exception of the latter charge, the crimes did not occur in the Southern District of New York. (P. 247-8, 255).

The jury found appellant guilty on counts one and two, but were unable to agree on the verdict for the additional five counts. On the 24th day of February, 1976, the Court sentenced appellant to a term of five years.

Appellant is presently imprisoned, serving the sentence imposed upon him.

POINT ONE

THE GOVERNMENT WENT BEYOND PERMISSIBLE BOUNDS IN INTRODUCING, OVER OBJECTION, EVIDENCE OF PRIOR CRIMINAL ACTS.

The evidence against appellant that he"knowingly" caused seven American Express Company money orders to be transported in interstate commerce was weak. There was not a scintilla of evidence that he knew them to be stolen.

Tennyson L. Hall, with a prior record for aiding and abetting in the distribution of drugs, for criminal possession of a dangerous weapon and for possession of stolen property (4a**), testified that appellant solicited him at the racetrack to cash American Express Company money

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** Page numbers followed by the letter "a" refer to appellant's appendix.

orders for him, which he did, giving the money to appellant. (P. 5-a - 12a). He conceded that he did not tell the F.B.I. at the onset that appellant had given him the securities. Assuming arguendo that the jury overcame the threshhold question whether the witness, an ex-offender, was not the real culprit, cashing the money orders on his own account, the second point that is highlighted from the record is that nothing therein reflects that appellant knew the money orders to be stolen. The statement made by appellant to the Special Agent Quinn was completely unincriminating. He acknowledged the signatures on the paper were his. He admitted depositing them in his account, but insisted he could not remember where he got them. He insisted he had never given money orders to any person to cash for them. (29a - 32a). After arraignment he asked the agent if he would have been arrested, had he told where he secured the money orders None of this evidence, taken in its most unfavorable light against appellant, indicated that he knew these money orders to be stolen. Thus, neither Tennyson Hall nor Agent Quinn furnished any evidence, whatsoever, that appellant had negotiated these money orders with the requisite criminal intent, necessary to support a conviction.

Tennyson Hall further testified that his g lfriend Ruby Burns also cashed money orders for appellant (13a -15a). Ruby Burns gave the same testimony (18a - 22a). Like Hall,

however, she did not give a scintilla of testimony that appellant knew the money orders to be stolen.

There is little doubt that these money orders had been originally stolen; however, the records fails to reflect that appellant knew this circumstance when he obtained possession of them. The record reflects that he deposited some in his own account, which certainly is not the act of a wrongdoer who consciously possesses stolen negotiable paper (24a - 28a). It might well be that appellant had received these money orders in payment of a valid debt owing to him and he had just as little knowledge that they had been stolen, as apparently Tennyson Hall and Ruby Burns.

Thus, without evidence of prior similar acts, there was not a scintilla of evidence in the record that appellant had any knowledge that he was dealing in stolen securities. Therefore, any offer to prove that appellant had dealt in the past in stolen securities was an offer to prove that he had a criminal propensity and, based merely on that, an invitation to the jury to convict. It is quite significant that the jury could not agree on five counts and found appellant guilty on only two, for those money orders that he deposited in his own account, which transactions certainly were couched in the least suspicion of all, in view of the open and forthright nature of the negotiation.

"Evidence of prior similar acts is admissible for all purposes except to show the criminal character or disposition of the defendant... The case law and the legal scholars uniformly indicate that such evidence is admissible if offered to prove knowledge, intent or design on the part of the defendant ... In ruling on the admissibility of such evidence, the trial judge is required to balance all of the relevant facts to determine whether the probative value of the evidence outweighs its prejudicial character." United States v. Brettholz , 485, 485 F. 2d 483 (2nd Circ., 1973). "Evidence of other crimes is admissible, if relevant, except when offered solely to prove criminal character". United States v. Papadakis, 510 F. 2nd 287 (2nd Circ., 1975). Where there is no evidence that a defendant acted with criminal knowledge and intent, other than evidence of prior criminal acts, such evidence reflects the criminal propensity of the defendat and therefore, falls within the exclusionary rule. Certainly, evidence of similar transactions, cannot be the only evidence on which the Governments relies, as in the case at bar. There must be some point at which the Court must rule that evidence of prior similar acts is too prejudicial to be used. It is submitted that such point was reached in the case at bar.

The defense objection to the offer of proof of similar criminal acts, was overruled. (33a - 35a). Introduced in evidence was another of the American Express money orders that came from the forty items that had been

stolen in this case. This item was not among the nine charged in the indictment. Evidence was introduced that appellant's fingerprint was found on the money order (35a). Such evidence, it is submitted, merely served to prejudice the jury.

Upon clear analysis, the presence of appellant's fingerprint on the money order, without any evidence of the circumstances concerning how it got there, is a neutral factor, which neither incriminates nor inculpates appellant. The difficulty, however, is that such evidence would tend to prejudice a jury into believing that appellant was the thief who stole the money orders, a surmise without any evidentiary support. The prior offense, to be admissible "must be convincingly proved." United States v. Adderly, 529 F. 2d 1178 (5th Circ., 1976). It cannot be said that the mere presence of the fingerprint of appellant on a money order proves that he ever possessed it, with knowledge that it had been stolen. Its receipt in evidence was no more than invitation for the jury to speculate that he was the thief who stole the money orders and therefore, he possessed them with criminal intent. Such prejudicial invitation, a jury may not be tendered, for fear it will accept it.

Arthur B. Fleming, who served eleven years in prison for robbery was presented by the Government to testify that he had been the crime partner of appellant in the past. He testified that appellant had a general propensity to

commit forgeries, in that appellant had advised him that if he ever came in contact with checks and bank books, appellant would show him how to earn money. (36a - 37a). This is not evidence of a prior similar act, but rather evidence, plain and simple, of a defendant's propensity to commit the act charged. "Reference to another crime is barred only if introduced solely for the purpose of showing that the defendant committed the crime on trial because he is a man of criminal character." United States v. Bozza, 365 F. 2d 206 (2nd Circ., 1966). The testimony of Fleming was clearly designed to prove appellant to be "a man of criminal character". It was evidence that appellant had told him he was ready and able to commit the type of crimes as charged in this indictment, but without reference to them and years before the incident occurred.

Fleming testified that he accepted appellant's alleged invitation and telephoned appellant to give him notice that he had come across a personal check from a friend of his father's. Appellant allegedly copied the account number, the name and address of the bank and the signature of the maker and took one of the cancelled checks. Over objection, Fleming testified that appellant made a check payable to the witness' father and the witness cashed it at the bank and split the proceeds with appellant. (37a - 42a). Not satisfied with testifying to the specific prior similar allegedly committed by appellant,

Fleming went on to testify that appellant and he did other forgeries together in 1971 and 1972, without even identifying them! (43a). Proof of similar acts must be "plain, clear and convincing." United States v. San Martin, 505 F. 2d 918 (5th Circ., 1974). To testify that appellant had committed forgeries over a two year period, without identifying those committed by him, does not satisfy the threshhold requirement of specificity, and therefore, wanders into the forbidden area of character assassination.

In view of the paucity of evidence against appellant- indeed, the complete lack of evidence that he ever knew the money orders in question to be stolen that he had deposited in his bank account (the only ones for which he has been convicted) - the unfair introduction of evidence that merely invited the jury to speculate that he was of a prior propensity to commit forgeries, was prejudicial and the judgment of conviction must be reversed.

POINT TWO

THE EVIDENCE AGAINST APPELLANT WAS INSUFFICIENT, AS A MATTER OF LAW, TO SUPPORT A CONVICTION.

As pointed out in "POINT ONE", no evidence had been introduced to show that appellant had knowledge that the American Express money orders had been stolen. Even in his opening statement to the jury, the Assistant United States Attorney made no offer to prove that appellant knew

the money orders to be stolen. Without proof of such knowledge, the Government fell short in meeting its burden of proof that appellant had knowingly caused stolen American Express Company money orders to be transported in interstate commerce, in violation of 18 U.S.C.A. 2314. As also set forth in "POINT ONE", the evidence of prior similar acts by appellant was no more than an invitation to the jury to speculate that appellant had a propensity to commit forgeries and therefore, possibly knew the money orders herein to be stolen. Such invitation to surmise and guess falls far short of the Constitutional requirement that the guilt of a defendant must be proven, beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 SCT 1068, 25 L. Ed 2d 368, 1971.

In the case at bar, reading the record, must lead to the ineluctable conclusion that the evidence against appellant was insufficient and the judgment of conviction must be reversed.

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED OR A NEW TRIAL ORDERED.

Respectfully submitted,

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A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

THE UNITED STATES OF AMERICA,

Appellee,

- against -

MAURICE BROWN,

Defendant-Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Reuben A. Shearer *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 211 West 144th Street, New York, New York 10030

That on the **17th** *day of* **August** *19* **76** *at* **1 ST. Andrews Plaza New York, N.Y.**

deponent served the annexed **appendix and briefs** *upon*

Robert Fiske, Jr.
U.S. Attorney- Southern District

the **Appellee** *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

Sworn to before me, this **17th**
day of **August** *19* **76**

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

Reuben Shearer

Reuben Shearer